

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 16, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

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No. 96-0175-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICK WINTER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Shawano County: ANN WALSH BRADLEY and JAMES P. JANSEN, Judges. *Affirmed.*

LaROCQUE, J. Rick Winter appeals a judgment of conviction for violating a harassment injunction issued under § 813.125, STATS.,¹ and an

¹ Section 813.125, STATS., provides:

Harassment restraining orders and injunctions. (1) Definition. In this section, "harassment" means any of the following:

- (a) Striking, shoving, kicking or otherwise subjecting another person to physical contact or attempting or threatening to do the same.
 - (b) Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.
- (2) Commencement of action. An action under this section may be commenced by

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filing a petition described under sub. (5) (a). No action under this section may be commenced by service of summons. Section 813.06 does not apply to an action under this section.

(3) Temporary restraining order. (a) A judge or court commissioner may issue a temporary restraining order ordering the respondent to cease or avoid the harassment of another person, if all of the following occur:

1. The petitioner files a petition alleging the elements set forth under sub. (5) (a).
2. The judge or court commissioner finds reasonable grounds to believe that the respondent has violated s. 947.013.

(b) Notice need not be given to the respondent before issuing a temporary restraining order under this subsection. A temporary restraining order may be entered only against the respondent named in the petition.

(c) The temporary restraining order is in effect until a hearing is held on issuance of an injunction under sub. (4). A judge or court commissioner shall hold a hearing on issuance of an injunction within 7 days after the temporary restraining order is issued, unless the time is extended upon the written consent of the parties or extended once for 7 days upon a finding that the respondent has not been served with a copy of the temporary restraining order although the petitioner has exercised due diligence.

(4) Injunction. (a) A judge or court commissioner may grant an injunction ordering the respondent to cease or avoid the harassment of another person, if all of the following occur:

1. The petitioner has filed a petition alleging the elements set forth under sub. (5) (a).
2. The petitioner serves upon the respondent a copy of a restraining order obtained under sub. (3) and notice of the time for the hearing on the issuance of the injunction under sub. (3) (c).
3. After hearing, the judge or court commissioner finds reasonable grounds to believe that the respondent has violated s. 947.013.

(b) The injunction may be entered only against the respondent named in the petition.

(c) An injunction under this subsection is effective according to its terms, but for not more than 2 years.

(5) Petition. (a) The petition shall allege facts sufficient to show the following:

1. The name of the person who is the alleged victim.
2. The name of the respondent.
3. That the respondent has violated s. 947.013.

(b) The clerk of circuit court shall provide simplified forms.

(5m) confidentiality of victim's address. The petition under sub. (5) and the court order under sub. (3) or (4) shall not disclose the address of the alleged victim.

(6) Arrest. A law enforcement officer shall arrest and take a person into custody if

order denying postconviction relief. The injunction barred Winter from harassing Bill Schmidt, contrary to § 947.013, STATS., which declares specified kinds of harassment illegal. The complaint alleged Winter made four phone calls over a period of approximately two months, three of which were recorded on Schmidt's telephone answering machine, that violated the injunction. Winter first contends his due process rights were violated because the criminal complaint failed to specifically identify which of the prohibited kinds of harassment described in § 947.013 applied to his conduct. In addition, he maintains that the harassment injunction statute, § 813.125, was applied in an unconstitutionally vague and overbroad way and that the injunction

thereby impinged on his constitutional right to free speech. Finally, he maintains that the failure to allege repetitive acts done with an intent to harass in the complaint was a fatal flaw. This court rejects his contentions and affirms.

PROCEDURAL BACKGROUND

The Shawano County Circuit Court entered an harassment injunction pursuant to § 813.125, STATS., restraining Winter from harassing the petitioner, Bill Schmidt, in violation of § 947.013, STATS.² Some months later, the
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all of the following occur:

- (a) A person named in a petition under sub. (5) presents the law enforcement officer with a copy of a court order issued under sub. (3) or (4), or the law enforcement officer determines that such an order exists through communication with appropriate authorities.
- (b) The law enforcement officer has probable cause to believe that the person has violated the court order issued under sub. (3) or (4).
- (7) Penalty. Whoever violates a temporary restraining order or injunction issued under this section shall be fined not more than \$1,000 or imprisoned not more than 90 days or both.

² Section 947.013, STATS., provides:

Harassment. (1) In this section:

- (a) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.
- (b) "Credible threat" means a threat made with the intent and apparent ability to

State charged Winter with violating the injunction by calling Schmidt on four occasions. At his initial appearance, Winter challenged the court's jurisdiction, alleging a failure to include sufficient factual allegations in the criminal complaint to support a finding of probable cause that he committed an offense. The affidavit in support of the motion to dismiss asserted an absence of probable cause to establish a violation of § 947.013(1m)(b), that subjects whoever "[e]ngages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose" to a penalty.

The trial court denied the motion, finding probable cause that Winter violated § 947.013(1r)(a), STATS., as well. After a bench trial, the court found Winter guilty and placed him on probation with a condition that he spend ten days in jail. The court later denied Winter's § 809.30, STATS., motion seeking postconviction relief.

TRIAL EVIDENCE

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carry out the threat.

(c) "Personally identifiable information" has the meaning given in s. 19.62 (5).

(d) "Record" has the meaning given in s. 19.32 (2).

(1m) Whoever, with intent to harass or intimidate another person, does any of the following is subject to a Class B forfeiture:

(a) Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same.

(b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

(1r) Whoever violates sub. (1m) under all of the following circumstances is guilty of a Class A misdemeanor:

(a) The act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm.

(b) The act occurs while the actor is subject to an order or injunction under s. 813.12, 813.122 or 813.125 that prohibits or limits his or her contact with the victim.

(1t) Whoever violates sub. (1r) is guilty of a Class E felony if the person has a prior conviction under this subsection or sub. (1r), (1v) or (1x) or s. 940.32 (2), (2m), (3) or (3m) involving the same victim and the present violation occurs within 7 years of the prior conviction. ...

The harassment injunction, dated November 5, 1992, and effective for two years, was based upon a finding of reasonable grounds to believe Winter had previously violated the criminal harassment statute, § 947.013, STATS. It enjoined and restrained Winter from harassing Schmidt contrary to § 947.013. At trial, Schmidt identified three calls over a period of approximately two months made to his residence by Winter, recorded on an answering machine and another call answered personally on May 23, 1993. The three transcriptions of the recorded calls read as follows:

[April 22, 1993]: Bill, if you're there, pick up the phone, otherwise it has come to my attention that Kimberly's car was stolen Thursday night, April 22, and there is a certain amount of incriminating evidence against you, if that's not true, give me a call back, if it's true give me a call back. Bye.

[April 23, 1993]: Bill, this is Rick Winter, I don't want you talking about my mother in public again in your life, it you want to have any kind of life what so ever, I'm going to sue your ass, period and you can dig it as deep as you want to, but, its going to be your grave. Alright? If you have got a problem with that, call me or write me or have your so called lawyers call me.

[June 15, 1993]: Bill, you are in very very deep trouble, very deep trouble, I expect you to reach Kimberly somehow tonight, and give the keys back for the house and the car, or answer to me, beyond what you will be answering to me for, and you can laugh any, you can laugh as much as you want, but, you're in trouble.

DISCUSSION

Winter first challenges the complaint on grounds it violated his right to due process for failure to apprise him of which particular provisions of § 947.013, STATS., he allegedly breached. This court concludes that Winter's failure to raise this issue in the trial court was a waiver of the objection. *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1983).

As noted earlier, Winter's motion challenging jurisdiction was based upon an absence of probable cause to show a violation of subsec. (1m)(b) of the criminal statute. The trial court denied the motion, and found that Winter had violated subsec. (1r) of the statute. It should be noted that a violation of subsec. (1r) requires a violation of (1m) as a prerequisite. Winter had several opportunities to challenge the failure to specify the subsections under which he was being charged. He could have raised the issue in his original motion. He had a second opportunity when the trial court indicated that he had violated § 947.013(1r), STATS., when the court rendered its bench decision. Failure to raise the issue prior to appeal constitutes a waiver.

Winter next argues that § 813.125, STATS., as applied, is both unconstitutionally vague and overbroad. It should be noted that Winter does not challenge the sufficiency of the evidence to convict. Rather, he argues that he was not properly placed on notice by the issuance of the injunction as to what conduct was prohibited. The real essence of Winter's objections was addressed and rejected in *Bachowski v. Salamone*, 139 Wis.2d 397, 407 N.W.2d 533 (1987), and *State v. Sarlund*, 139 Wis.2d 386, 407 N.W.2d 544 (1987). "To survive a vagueness challenge a statute must be sufficiently definite to give persons of ordinary intelligence who wish to abide by the law sufficient notice of the proscribed conduct." *Bachowski*, 139 Wis.2d at 406, 407 N.W.2d at 537. No doubt the injunction must provide the same notice. The injunction notified Winter that he could not act contrary to § 947.013, STATS. More was unnecessary.

"A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate." *Bachowski*, 139 N.W.2d at 411, 407 N.W.2d at 539. The restriction that Winter not act contrary to § 947.013, STATS., was also sufficiently narrow. The injunction enjoined Winter from harassing Schmidt contrary to § 947.013. Because the statute declaring which conduct is unlawful is neither vague nor overbroad, an injunction to refrain from violating the terms of the statute is similarly valid.

Finally, Winter challenges the failure to allege a course of conduct or repetitive acts intended to harass or intimidate. Winter did not raise this issue in the circuit court. The failure to articulate an element of the crime but referring to the substantive statute defining the crime is sufficient to support a prosecution as long as the defendant is not prejudiced in any way by the failure

to set forth every element of the crime. *State v. Petrone*, 161 Wis.2d 530, 552-62, 468 N.W.2d 676, 684-87 (1991). Because any violation of § 947.013, STATS., requires an intent to repeatedly harass or intimidate another person, the reference to the statute sufficiently alleged intent. Section 947.013 penalizes whoever "with intent to harass or intimidate another person ... [e]ngages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose." Subsection (1)(r) increases the penalty where "[t]he act is accompanied by a credible threat that places the victim in reasonable fear of death or great bodily harm" and "[t]he act occurs while the actor is subject to an ... injunction under s. ... 813.125" The complaint sufficiently advised Winter of the allegations upon which the charge was based. He was therefore sufficiently notified so as to apprise him of the elements of the crime charged. The complaint did not violate the requirements of due process.

By the Court. – Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.